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OPTION REPORTS

PROTECTIONS AGAINST ILLEGAL ADMINISTRATIVE ACTIONS

September 18, 2008

The following report is one of a series produced by the Constitutional Design Group, a group of scholars dedicated to distributing data and analysis useful to those engaged in constitutional design. The primary intent of the reports is to provide current and historical information about design options in written constitutions as well as representative and illustrative text for important constitutional provisions. Most of the information in these reports comes from data from the Comparative Constitutions Project (CCP), a project sponsored by the National Science Foundation. Interested readers are encouraged to visit constitutionmaking.org for further resources for scholars and practitioners of constitutional design.

Note that the dates provided herein for constitutional texts reflect either the year of initial promulgation *or* of a subsequent amendment, depending on the version used for analysis. For example, Brazil 2005 refers to the Brazilian Constitution of 1988, as amended through 2005.

1. INTRODUCTION

With the rise of the modern state, constitutional protection against illegal or ultra vires administrative action has assumed greater importance. Constitutions sometimes provide for compensation for those harmed by illegal actions by government or specify provisions for challenging such actions. We describe below the range of constitutional provisions in this area. Note that constitutional establishment of administrative courts is dealt with in another report.

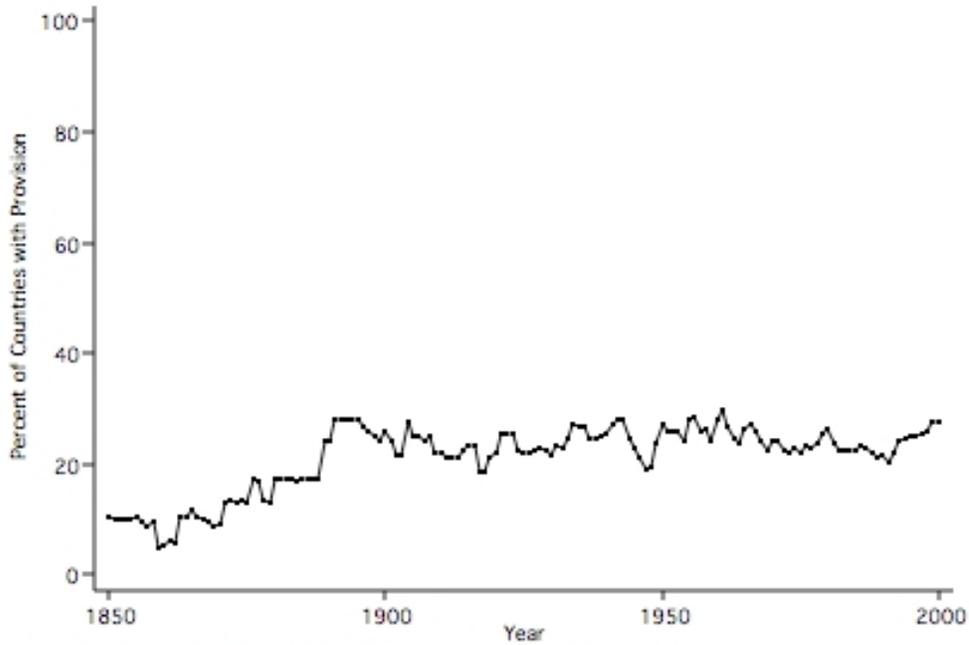
2. DATA SOURCE(S)

The analysis reported below is based on data the Comparative Constitutions Project (please see the appendix for more information on this resource). As of this writing, the project sample includes 550 of the roughly 800 constitutions put in force since 1789, including more than 90% of constitutions written since World War II.

3. CLASSIFICATION AND HISTORICAL TRENDS

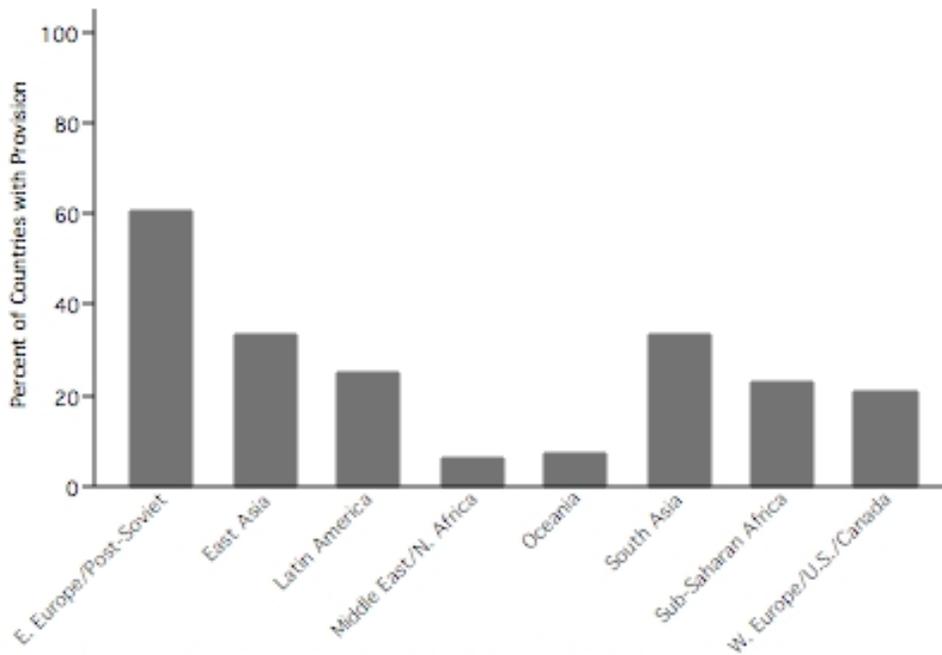
Overall, 27% of constitutions in the sample have provided for protections against illegal administrative acts. As Figure 1 suggests, incorporation of such protections in constitutional texts increased in the second half of the 19th century and has oscillated slightly since. In 2000, 28% of constitutions in force provided for protections against illegal administrative acts. Figure 2 shows regional variation among these constitutions. The figure indicates that such protections are most common in Eastern Europe, South Asia, and East Asia, and least common in the Middle East, Oceania, and Western Europe.

Figure 1. Percent of Constitutions That Provide for Protections Against Illegal Administrative Actions by Year (N=550)



Data from the Comparative Constitutions Project - www.comparativeconstitutionsproject.org

Figure 2. Percent of Constitutions That Provide for Protections Against Illegal Administrative Actions in 2000 by Region (N=191)



Data from the Comparative Constitutions Project - www.comparativeconstitutionsproject.org

4. NOTES ON ATYPICAL CASES

None.

5. SAMPLE CONSTITUTIONAL PROVISIONS

(Note: dates provided reflect the version of the constitution used to obtain sample provisions, and represent either initial year of promulgation or year through which subsequent amendments are included.)

(1) Any person suffering undue harm by government action is entitled to compensation, which he can claim by appealing to court. (2) With the exception of situation stated in the law, the state cannot claim its right without the order of an authorized court.

- *Afghanistan 2004, Article 51*

Justice recognizes remedies against illegal acts of the administrative authorities.

- *Algeria 2002, Article 143*

The Supreme Administrative Court shall render judgment upon the illegality of acts (decisions and orders) of the administrative authorities. The administrative act is not illegal insofar as the administrative authority was authorized by law to act upon its own discretion, and used its discretion in conformity with the law.

- *Austria 1929, Article 129*

The Constitution assures Brazilians and foreigners residing in the country the inviolability of the rights respecting life, liberty, individual security, and property in the following terms:

...

§ 24. To protect clear and certain rights not covered by habeas corpus, a writ of security shall be granted, whatever may be the authority responsible for the illegality or abuse of power.

- *Brazil 1946, Article 141.24*

All persons shall have the right to submit petitions, and institute administrative proceedings (at the Administrative Court) in accordance with law (for the redress of wrongs done by Government administrative organs).

- *China 1931, Article 22*

The Court of Justice of the Republic consists of fifteen members: twelve members of Parliament, elected in equal number from among their ranks by the National Assembly and the Senate after every general or partial

renewal by election of these Assemblies, and three judges of the Court of Cassation, one of whom shall preside over the Court of Justice of the Republic.

Any person claiming to be a victim of a crime or offense committed by a member of the Government in the exercise of his duties may lodge a complaint with a petitions committee.

This committee shall order the case to be either closed or forwarded to the chief public prosecutor at the Court of Cassation for referral to the Court of Justice of the Republic. The chief public prosecutor at the Court of Cassation may also make a reference *ex-officio* to the Court of Justice of the Republic with the assent of the petitions committee. An organic law determines the conditions of the application of this article.

- *France 2005, Article 68-2*

Supervision by the elected representative bodies and administrative jurisdiction serves to protect citizens against unlawful acts committed by the administration.

The structure and competence of the administrative courts are defined by law.

Provisions corresponding to those regarding the election and recall of judges of ordinary courts apply also to the members of administrative courts.

- *German Democratic Republic 1960, Article 138*

The jurisdiction of the Federal Supreme Court shall be as follows:

...

(2) Original and exclusive jurisdiction, on the basis of a complaint from a claimant or a referral from another court, to review claims that a law, regulation, or directive issued by the federal or regional governments, the governorate or municipal administrations, or local administrations is inconsistent with this Law.

- *Iraq 2004, Article 44.B.2*

Against acts of the public administration the judicial safeguarding of rights and legitimate interests before the organs of ordinary or administrative justice is always permitted.

Such judicial protection may not be excluded or limited in particular kinds of appeal or for particular categories of acts.

The law determines which organ of jurisdiction can annul acts of public administration in the cases and with the consequences provided for in the law itself.

- *Italy 2003, Article 113*

No suit which relates to rights alleged to have been infringed by the illegal measures of the executive authorities, and which should come

within the competency of the Court of Administrative Litigation, specially established by law,' shall be taken cognizance of by a court of law.

- *Japan 1889, Article 61*

The laws regarding administrative responsibilities shall determine the obligations of public officials, with the purpose of safeguarding the legality, honor, loyalty, impartiality, and efficiency in the discharge of their functions, positions, duties, and commissions; the sanctions applicable for acts or omissions that they incur, as well as the procedures and authorities to apply them. These penalties shall consist, in addition to those provided by law, of suspension, dismissal, and disqualification, as well as economic sanctions, and must be set in proportion to the economic benefits obtained by the responsible and with the economic damages caused by his acts or omissions as referred to by section III of Article 109, but they may not exceed three times the benefits obtained or the damages and injuries caused.

The responsibility of the State for damages caused to the property or rights of private individuals resulting from irregular administrative activities shall be objective and direct.

The individuals shall have the right to an indemnification in accordance with the bases, limits, and procedures established by law.

- *Mexico 2003, Article 113*

Everyone has the right to compensation by the state for the damage caused by unlawful actions (or inaction) of state organs, or their officials.

- *Russia 1993, Article 53*

Just administrative action

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.

- *South Africa 2003, Article 33*

Art. 101. The law shall provide recourse against unlawful acts or provisions adopted by the Administration in the exercise of its regulatory power, and against acts of the same discretionary constituent of excess or abuse of power.

Art. 106. All Spanish shall be entitled to be compensated for the damages that were incurred by judicial error or crime of judicial officials in the exercise of their office, as determined by the laws.

The State shall be secondarily liable for these damages.

- *Spain 1931, Articles 101; 106*

Administrative Courts have the powers to try and adjudicate cases of dispute between a Government agency, State agency, State enterprise, local administration, or State official under the superintendence or supervision of the Government on one part and a private individual on the other part, or between a Government agency, State agency, State enterprise, local administration, or State official under the superintendence or supervision of the Government on the one part and another such agency, enterprise, administration and official on the other part, which is the dispute as a consequence of the act or omission of the act that must be, according to the law, performed by such Government agency, State agency, State enterprise, local administration, or State official, or as a consequence of the act or omission of the act under the responsibility of such Government agency, State agency, State enterprise, local administration or State official in the performance of duties under the law, as provided by law.

There shall be the Supreme Administrative Court and Administrative Tribunals, and there may also be the Appellate Administrative Court.

- *Thailand 1997, Article 276*

Due process will be applied to all the judicial and administrative actions, and in consequence:

...

8. Any person can request of the State the reestablishment or reparation of the juridical situation damaged by judicial error, delay or unjustified omission. The rights of the individual to require the personal responsibility of the magistrate, judge and of the State, and to act [*actuar*] against these, is preserved.

- *Venezuela 1999, Article 49.8*

6. APPENDIX

This report is based on the following question(s) from the Comparative Constitution Project's "survey instrument":

[ILLADMIN]-Does the constitution contain provisions protecting the individual against illegal or ultra-vires administrative actions?

1. Yes
2. No
96. other, please specify in the comments section

97. Unable to Determine

For additional documentation on the Comparative Constitutions Project, (including the full codebook, the sample, the sources of constitutional texts and translation issues related to those texts, coding procedures, publicly available data, etc.) please visit the project website at www.comparativeconstitutionsproject.org.